MOHAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[ORIGINATING MOTION NO: 44-43-2001]
7 DECEMBER 2001

CRIMINAL PROCEDURE: *Bail - Security for bail - Whether lawful to require security by bailor when executing bail bond - Sufficiency of a surety - Whether left to the discretion of court - Factors to be considered - Whether bailor entitled to seek variation of amount of bail - Proper procedure to be adopted - Criminal Procedure Code, ss. 389, 390(1) ,391(1), 394, 403, 404(1), 404(2)*

The applicant in the notice of motion ('the motion') before the court was charged in the sessions court for an offence under s. 409 of the Penal Code and was ordered to be released on bail in the sum of RM70,000 with one surety. His bailor was his wife and as security for the bail amount she furnished a bank account book with a deposit of RM70,000. In the affidavit accompanying the motion the applicant affirmed that his wife had used up all her savings to bail him out and they are now in a financial desparate situation. In the circumstances the applicant prayed for an order for his bail to be varied. The issues for determination in this motion are: (1) whether it was lawful for the court to require security to be furnished by a bailor when executing a bail bond and (2) whether a bailor was entitled in law to seek a variation of the amount of bail in respect of which he has executed the bond.

Held:

[1] It is left to the court to decide on the sufficiency of a surety. In exercising this discretion the court must be satisfied that a proposed surety has the capacity to ensure the attendance of an accused in court when required. Thus a court must personally satisfy itself as to the reliability and solvency of a proposed surety. (p 490 c-d)

[1a] The exercise of this discretion by the court is unfettered as the word "sufficient" has been used in s. 390(1) of the Criminal Procedure Code in its general sense without any qualification. A decision on the sufficiency of a surety, being the exercise of a discretion, may entail not only an inquiry into the ability of a person to be accepted as a surety

a but also an alternative requirement, where considered necessary by the court, that he do furnish some form of security in order to be so accepted. Hence, it was lawful for the court to require security to be furnished by a bailor when executing a bail bond.
(p 490 e-f, i & 491 a)

b **[2]** A bailor is not entitled in law to seek a variation of the amount of bail in respect of which he has executed the bond. The proper course to be adopted by the bailor is to follow s. 393 of the Criminal Procedure Code pursuant to which she may apply to the Sessions Court to be discharged from the bond. The applicant may then make an appropriate application c for the bail sum to be reduced or for the acceptance of a lesser cash deposit *in lieu* of the execution of a bond. (p 491 g-i)

[Motion dismissed.]

Case(s) referred to:
d *Abdul Gani v. Emperor [1947] 48 Cr LJ 773*
KP Madhavan Pillai v. State 1950 Ker LT 670
Lau Kung Seng & Ors v. PP [1997] 5 MLJ 323
Niamat Khan v. Crown AIR 1951 Nag 206
PP v. Dato' Mat [1991] 2 MLJ 186
PP v. Zulkiflee Hassan [1990] 2 MLJ 215
e *Public Bank Bhd v. Perwira Affin Bank Bhd [2001] 7 CLJ 447*
R v. Harrow Justices, ex parte Morris [1972] 3 All ER 494
RR Chari v. Emperor AIR 1948 All 238
Rajballam Singh v. Emperor AIR 1943 Pat 475
State of Mysore v. H Venkatarama Kotaiyah [1968] 74 Cr LJ 696
f *Sulaiman Kadir v. PP [1976] 2 MLJ 37*
Wong Swee Yee v. PP [1994] 4 CLJ 87

Legislation referred to:
Criminal Procedure Code, ss. 389, 390(1), 391(1), 394, 403, 404(1), 404(2)
Penal Code, s. 409

g Criminal Procedure Code [India], s. 499

Other source(s) referred to:
Bail-Law and Practice, 3rd edn, p 517

For the applicant - Rabin Devadason; T/n Devadason & Devadason
h *For the respondent - Dzulkifli Ahmad DPP*
As Amicus Curiae - Wong Kian Kheong (Karen Lee); M/s Lee Hishamuddin

Reported by Suhainah Wahiduddin

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JUDGMENT

Augustine Paul J:

The dominant issue for determination in the notice of motion ("the motion") before me is whether it is lawful for the court to require security to be furnished by a bailor when executing a bail bond.

The applicant in the motion before me is Mohan MS Maniam ("the applicant"). He was charged in the sessions court at Kuala Lumpur for an offence under s. 409 of the Penal Code *vide* Arrest Case No: 4-62-12-98 and was ordered to be released on bail in the sum of RM70,000 with one surety. His bailor was his wife, one Puspa Mala Kotteswaran. As security for the bail amount she furnished a bank account book with a deposit of RM70,000 in Bank Bumiputra Malaysia Bhd. In the affidavit accompanying the motion the applicant affirmed that his wife had used up all her savings to bail him out. They are now in a desperate financial situation. Their house is charged to MBf Finance Bhd and they are in arrears of 41 months' installments. They have been threatened with foreclosure proceedings. They have no other funds to pay the arrears. In the circumstances the applicant prayed for an order for his bail to be varied to RM20,000 so that they will have a sum of RM50,000 to pay the arrears of installments.

At the commencement of the hearing of the motion before me the learned deputy public prosecutor raised a preliminary objection. He argued that the applicant has no right to make this application in the High Court as he ought to have applied first in the sessions court which made the initial order of bail. In support of his submission he relied on *PP v. Zulkiflee Hassan* [1990] 2 MLJ 215 and *PP v. Dato' Mat* [1991] 2 MLJ 186. Learned counsel for the applicant, in saying that the application can be made in the High Court, relied on *Sulaiman Kadir v. PP* [1976] 2 MLJ 37 and the case of *PP v. Zulkiflee Hassan* [1990] 2 MLJ 215 which had earlier been cited by the learned deputy public prosecutor. In my opinion the objection raised has been resolved in clear terms by Wan Yahya J (as he then was) in *PP v. Dato' Mat* [1991] 2 MLJ 186 where his Lordship said at p. 189 that:

> ... several ingresses to bail have been provided by statute which gives the option to an accused person to either go before the same court or apply to a higher court for reconsideration or variation of his bail. It is for him to proceed by whichever avenue that may appear to be more expeditious or practical in the circumstances. Moreover, the appellate remedy under s. 394 of the Criminal Procedure Code, as suggested by Mr Deputy, is neither a simple or a speedy procedure and is certainly not the best option available in an exigent situation facing an arrested person.

> If the High Court is to fulfil its supervisory role in providing a speedy and efficacious redress of any injustice arising out of a person's pre-trial detention, then it must be given an unimpeded discretion to intervene and if circumstances so require to vary any unjust subordinate court order in respect of the amount or conditions set out in any bail bond.

It follows that the applicant is entitled to make this application in the High Court. Accordingly, I dismissed the preliminary objection raised by the prosecution.

Learned counsel then proceeded to argue on the merits of the case. He said that the applicant has three children and has been attending court on every occasion. He said that in view of the financial problems faced by the applicant and the bailor the bail amount ought to be reduced. I then inquired whether it is lawful for an accused who has been released on bail to apply for a variation of the bail amount. At this stage Wong Kian Kheong, an advocate and solicitor who was present in court in respect of another matter, and with leave of court as *amicus curiae*, said that it is not valid, in the first place, for the sessions court to have taken security from the bailor when she executed the bond. He said that the intention of the Criminal Procedure Code is not to require security from bailors. That was indeed a very stimulating and novel address. I asked Wong whether he could support his stand with authorities. He said that he could do so if time is given to him. I adjourned the hearing of the motion to another date to enable the parties to do the necessary research.

In support of his argument that the court has no power to order that security be provided in addition to the execution of a bail bond, Wong first referred to ss. 390(1), 391(1), 403, 404(1) and 404(2) of the Criminal Procedure Code. They read as follows:

Section 390(1)
Before any person is released on bail, or released on his own bond, a bond for such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail by one or more sufficient sureties, conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or court, as the case may be.

Section 391(1)
As soon as the bond has been executed the person for whose appearance it has been executed shall be released and when he is in prison the court admitting him to bail shall issue an order of release to the officer in charge of the prison, and that officer, on receipt of the order, shall release him.

Section 403

When any person is required by any court or officer to execute a bond, with or without sureties, the court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money to such amount as the court may fix, instead of executing the bond.

Section 404(1)

Whenever:

(a) it is proved to the satisfaction of the court by which a bond under this Code has been taken; or

(b) when the bond is for appearance before a court, it is proved to the satisfaction of that court,

that the bond has been forfeited the court shall record the grounds of such proof and may call upon any person bound by the bond to pay the penalty thereof or to show cause why it should not be paid.

Section 404(2)

If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of the property belonging to that person.

Wong said that pursuant to s. 391(1) an accused person must be released as soon as the bond has been executed. He referred to the words " … to pay the penalty … " in s. 404(1) and said that they provide for payment of the bond sum in the future and do not envisage the deposit of money or the provision of other forms of security at the time the accused person is granted bail. He added that this view is supported by s. 404(2) which empowers the court to recover the bond sum by attaching the property of the surety. He referred to the form of bail bonds, as contained in Form 3 in the second schedule to the Criminal Procedure Code, and said that the words "bind myself to forfeit" in the form contemplate only an undertaking which again supports the argument that no security should be taken when a bail bond is executed. He added that s. 403, which provides for a deposit of a sum of money *in lieu* of execution of a bond, means that the execution of a bond is sufficient *per se* in law for the accused person to be released on bail. He then said that the word "bond" itself has been defined in *The Law Lexicon with Legal Maxims*, Reprint Edn 1993, as:

> An agreement of engagement; a covenant between two or more persons. Technically a bond is a deed or obligatory instrument, in writing, whereby one doth bind himself to another, to pay, a sum of money, or to do some other act; but in popular language any instrument in writing that legally binds a party to do a certain thing may be called a bond …

He referred to *Wong Swee Yee v. PP* [1994] 4 CLJ 87 where it was held that a bond has a contractual effect. As such, he said, a bond cannot and should not be secured by any deposit of cash or by any other means. In support of his submission Wong relied on Indian cases such as *RR Chari v. Emperor* AIR 1948 All 238, *Rajballam Singh v. Emperor* AIR 1943 Pat 475, *State of Mysore v. H Venkatarama Kotaiyah* [1968] 74 Cr LJ 696, *Niamat Khan v. Crown* AIR 1951 Nag 206 and *Abdul Gani v. Emperor* [1947] 48 Cr LJ 773 where it has been held that s. 499 of the Indian Criminal Procedure Code (similar to our s. 390(1)) does not authorise the magistrate to demand cash security from the accused. This view was adopted in *Lau Kung Seng & Ors v. PP* [1997] 5 MLJ 323. He also referred to the English case of *R v. Harrow Justices, ex parte Morris* [1972] 3 All ER 494 where Lord Widgery CJ said at p. 496:

> I would conclude by emphasising that where a court proposing to grant bail is minded to require sureties to enter into a recognisance, the court may, and no doubt will, refuse to grant bail if not satisfied that the sureties are good for the sums which they have promised to pay. If there is doubt whether a surety will, in the event, be able to pay the sum which he has committed himself to pay, the justices can properly reject him as a surety, and in the absence of a substitute, refuse bail, but having decided that a surety is adequate to stand bail for the amount involved, there is in my judgment no authority for the court to go on and require that that surety shall put down any specific sum of money or other security as a condition of bail being granted.

In his reply the learned deputy public prosecutor said that though the Criminal Procedure Code is silent on the requirement of security in the execution of a bail bond it has been the practice in the subordinate courts to require such security by way of land titles and bank deposits. He added that the Indian cases relied on by Wong are based on s. 403 which provides for the taking of a cash deposit only *in lieu* of executing a bond. He concluded by saying that the court, in any event, has the discretion to require security to be furnished.

In my opinion the question of whether a court is empowered to order security to be furnished when a bail bond is being executed is dependent on the scope and ambit of what is being executed, that is to say, the bail bond. If it cannot be secured by any manner then the submission advanced by Wong will have merit. *Black's Law Dictionary* 6th edn defines "bail bond" as:

> *Bail bond*. A three-party contract which involves state, accused and surety and under which surety guarantees state that accused will appear at subsequent proceedings. *Accredited Surety & Cas Co Inc v. State, for Use and Benefit of Hillsborough County*, Fla App 383 Sa 2d 308.

> A written undertaking, executed by the defendant or one or more sureties, that the defendant designated in such instrument will, while at liberty as a result of an order fixing bail and of the execution of a bail bond in satisfaction thereof, appear in a designated criminal action or proceeding when his attendance is required and otherwise render himself amenable to the orders and processes of the Court, and that in the event he fails to do so, the signer of the bond will pay to the Court (ie forfeit) the amount of money specified in the order fixing bail. Fed R Crim P46; 18 USCA 3141 et seq. See also Release on own recognisance.
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> *Cash bail bond*. A sum of money, in the amount designated in an order fixing bail, posted by a defendant or by another person on his behalf (surety) with a court or other authorised public officer upon conditions that such money will be forfeited if the defendant does not comply with the directions of a court requiring his attendance at the criminal action or proceeding involved and does not otherwise render himself amenable to the orders and processes of the court.
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> *Unsecured bail bon*d. A bail bond for which the defendant is fully liable upon failure to appear in court when ordered to do so or upon breach of a material condition of release, but which is not secured by any deposit of or lien upon property. See Release on own recognisance.

The phrase "release on own recognisance" is defined in the same dictionary as:

> Pre-trial release based on the person's own promise that he will show up for trial (no bond required). A species of bail in which the defendant acknowledges personally without sureties his obligation to appear in court at the next hearing or trial date of his case. It is used in place of a bail bond when the judge or magistrate is satisfied that the defendant will appear without the need of surety bond or other form of security.

It can therefore be confidently stated that an accused person can be released on bail upon the execution of a recognisance or a bail bond. Recognisance as a mode of release is an accepted form in some common law jurisdictions (see *Bail - Law and Practice* 3rd Edn p 517). It is not prescribed in our Criminal Procedure Code though it is analogous to the release of a person on him executing a bond for his appearance without sureties. The definition of "unsecured bail bond" that I have referred to earlier as being one which is not secured by any deposit of or lien upon property suggests that a bail bond can also be secured. To my mind s. 403 supports this approach. It permits the deposit of a sum of money *in lieu* of the execution of a bond. The object of the section is to provide an easier route to a person who is unable to arrange for the execution of a bond. Surely the deposit of a sum of money as authorised by the section will cause greater hardship than the execution of a mere unsecured bond. An accused who seeks the alternative of a cash deposit must therefore have been confronted with a greater hardship than the execution of an unsecured bond. That can only mean that the execution of a bond has

in contemplation the furnishing of security. Additionally, s. 390(1), in its reference to the release of a person on bail by one or more "sufficient" sureties, lends further support to my view. The word "sufficient" is defined in *Black's Law Dictionary* 6th Edn as:

> Adequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object. Of such quality, number, force or value as to serve a need or purpose. *Nissen v Miller* 44 NM 487, 105, P 2d 324, 325.

Clearly the word "sufficient" does not refer to the number of sureties as that would already have been determined by the court. It therefore refers to their sufficiency to be accepted as sureties after such determination. It is left to the discretion of the court to decide on the sufficiency of a surety. In exercising this discretion the court must be satisfied that a proposed surety has the capacity to ensure the attendance of an accused in court when required. It must also be remembered that the undertaking given by a surety to ensure the attendance of an accused is quite independent from the undertaking given by an accused to appear in court. Thus a court must personally satisfy itself as to the reliability and solvency of a proposed surety. To that extent it is the responsibility of the court to ensure that he is a fit and proper person to be accepted as a surety. The exercise of this discretion by the court is unfettered as the word "sufficient" has been used in s. 390(1) in its general sense without any qualification. A decision on the sufficiency of a surety, being the exercise of a discretion, may entail not only an inquiry into the ability of a person to be accepted as a surety but also an alternative requirement, where considered necessary by the court, that he do furnish some form of security in order to be so accepted. It must also be observed that the relevant provisions of the Criminal Procedure Code use the word "bond" in its general sense without any qualification. It therefore contemplates a secured as well as an unsecured bond. My response to Wong's argument that the words " … to pay the penalty … " in s. 404(1) refer to a payment in the future thereby excluding the provision of security cannot be sustained as the payment must, as of necessity, refer to the future because at the time when the bond is being executed there will be no breach giving rise to payment of the penalty. His contention that the words "bind myself to forfeit" in Form 3 contemplate only an undertaking thereby precluding the taking of a security cannot also be sustained as an undertaking itself, like a guarantee, can be required to be secured (see *Public Bank Bhd v. Perwira Affin Bank Bhd* [2001] 7 CLJ 447). I am also of the opinion that the authorities submitted by him do not support the stand taken by him. The Indian cases can be explained on the basis that the procedure for taking cash deposits must be in accordance with the procedure laid down in s. 403. The English case of *R v. Harrow Justices, ex-parte Morris* [1972] 3 All ER 494 is not relevant as it deals with recognisances and not bail bonds. I therefore hold that it is lawful for a court to require

security to be furnished by a bailor when executing a bail bond. I express my gratitude to Mr Wong for the very extensive research that he had undertaken in presenting his most eloquent and attractive argument.

In the motion before me the applicant has already been released on bail upon the execution of the bail bond. The person facing difficulties and, consequently, seeking a reduction of the bail amount is in actual fact the bailor. This raises the question of whether a bailor can seek to vary the amount of bail in respect of which he has executed the bond. The variation of the amount of bail fixed can be sought as authorised by ss. 389 and 394 of the Criminal Procedure Code which read as follows.

Section 389
The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a judge may, in any case, whether there be an appeal on conviction or not direct that any person be admitted to bail or that the bail required by a police officer or court be reduced or increased.

Section 394
Any person aggrieved by any order or refusal of any inferior court made under this chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior court

Section 389 refers, *inter alia,* to the power of the High Court to reduce or increase the amount of bail required by a court. It is a power that is exercisable once an order for bail has been made. As it refers to a variation of the bail amount required it contemplates a situation where the bail bond has not been executed. The only person who has an interest in the amount of bail required is the accused. Section 394 refers to a person "aggrieved" by an order that has been made. Such a person is one who has been affected by the order that has been made. A bailor is not a person affected by an order for bail and is therefore not a person "aggrieved" within the meaning of the section. It follows that under both the sections a bailor is not a person with an interest to move the High Court. In the circumstances a bailor is not entitled in law to seek a variation of the amount of bail in respect of which he has executed the bond. The proper course to be adopted by the bailor is to follow s. 393 pursuant to which she may apply to the sessions court to be discharged from the bond. If she produces the applicant before the court at the time she applies to be discharged the question of forfeiture of her bond will not arise (see *KP Madhavan Pillai v. State* 1950 Ker LT 670). The bond that she had executed will be discharged. The applicant may then make an appropriate application for the bail sum to be reduced or for the acceptance of a lesser cash deposit *in lieu* of the execution of a bond. In the upshot I dismiss the motion.